INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented	3
Statement	4
Description of the Litigation	6
Argument	
I The Question Presented Does Not Have The Importance Ascribed To It By The Commission ...	9
II There Is No Conflict Between The Decision Of The Court Below And The Decision Of The Court Of Appeals For The Ninth Circuit In *Board of Governors of Federal Reserve System* v. *Transamerica Corporation*	10
III The Court Of Appeals Correctly Held That Congress Had Not Authorized The Federal Trade Commission To Petition That Court For Interlocutory Relief In Order To Make It Less Difficult For The Commission To Devise An Effective Remedy Against An Alleged Violation Of The Clayton Act	13
IV The Answer To The Question Presented By The Petition For Certiorari Is Plainly Indicated By The Decisions In This Court Construing The All Writs Act	17
V It Would Be A Manifest Abuse Of Discretion For The Court Of Appeals To Issue An Extraordinary Writ In This Case Even If It Has Power To Do So	19
VI The Question Presented By The Petition For Certiorari Is Too Vague And Hypothetical To Be Decided By This Court On The Record Before It.	23

PAGE

Conclusion 24

CITATIONS

Cases:

Bankers Life and Casualty Company v. *Holland*, 346 U.S. 379 17

Board of Governors v. *Transamerica Corp.*, 184, F. 2d 311, certiorari denied, 340 U.S. 883 10-13

Ekco Products Company v. *Federal Trade Commission*, 347 F. 2d 745 9

Ex Parte Fahey, 332 U.S. 658 17

Ex Parte Rowland, 104 U.S. 604 17

Federal Trade Commission v. *Eastman Kodak*, 274 U.S. 619 ..... 14, 15

Federal Trade Commission v. *International Paper Co.*, 241 F. 2d 372, 53 FTC 1192, 56 FTC 1671 ... 12-13

Myers v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41 16

N.L.R.B. v. *Radio & Telev. Broadcast Eng. Union*, 364 U.S. 573 16

Peters v. *Hobby*, 349 U.S. 331 14

Platt v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240 18

Rathbun v. *United States*, 295 U.S. 602 14

United States v. *The Borden Co.*, 370 U.S. 460 18

United States v. *DuPont & Co.*, 366 U.S. 316 .....9, 24

United States v. *Hayman*, 342 U.S. 205..... 18

United States v. *Morton Salt Co.*, 338 U.S. 632..... 16

Statutes:

Administrative Procedure Act
Section 2, 5 U.S.C. 1001 *et seq.*, 1002 16

PAGE

Clayton Act
Section 7, 15 U.S.C. 18 .....2, 3, 6, 9, 11, 12, 14, 17, 18, 21
Section 8, 15 U.S.C. 19 12
Section 11(b), 15 U.S.C. 21(b) 2, 4, 6, 12, 14, 17, 18
Section 11(c), 15 U.S.C. 21(c) 3, 12, 15
Section 15, 15 U.S.C. 25 .....3, 15, 18

Federal Trade Commission Act
Section 5(c), 15 U.S.C. 45(c) 15
Section 13, 15 U.S.C. 53 14

Flammable Fabrics Act
Section 6, 15 U.S.C. 1195 14

Fur Products Labeling Act
Section 9, 15 U.S.C. 69(g) 14

Textile Fiber Products Identification Act
Section 8, 15 U.S.C. 70(f) 14

Wool Products Labeling Act
Section 7, 12 U.S.C. 68(e) 14

28 U.S.C. 507 18

28 U.S.C. 1254(1) 2

28 U.S.C. 1292(1) 20

28 U.S.C. 1651(a) 3, 4, 11, 12, 14, 17, 19, 20

United States Supreme Court Rule 30..... 19

Federal Rules of Civil Procedure 52(a), 65 20

Procedure and Rules of Practice of the Federal Trade Commission §1.112 16

16 C.F.R. 1.1 *et seq.* 16

Miscellaneous:

Petition For Writ of Certiorari, Brief for Respondents, *Transamerica Corporation* v. *Board of Governors of the Federal Reserve System,* Nos. 322, 323 October Term 1950 11-12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 970

FEDERAL TRADE COMMISSION,
Petitioner,

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY,
Respondents.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF RESPONDENT BOWFUND CORPORATION IN OPPOSITION

OPINION BELOW

The orders entered by the court of appeals are not reported.

JURISDICTION

The order of the court of appeals dismissing the emergency petition of the Commission was entered on January 19, 1966. The jurisdiction of this Court was invoked by the Federal Trade Commission on January 20, 1966, by the filing of its application for preliminary injunction. The statutory basis for that application has not been identified

by the Commission. The jurisdiction of this Court is now invoked by a petition for a writ of certiorari filed on January 31, 1966, pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 7 of the Clayton Act, as amended, provides, in part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . ." 15 U.S.C. 18.

Section 11(b) of the Clayton Act provides, in part:

> "Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, ... If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. . . ." 15 U.S.C. 21(b).

Section 11(c) of the Clayton Act provides, in part:

> "To the extent that the order of the commission or board is affirmed, the Court shall issue its own order commanding obedience to the terms of such order of the commission or board. . . ." 15 U.S.C. 21(c).

Section 15 of the Clayton Act provides, in part:

> "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. . . ." 15 U.S.C. 25.

The "All Writs Act" provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission has been authorized by Congress to initiate a proceeding in the court of appeals to obtain equitable relief against a threatened violation of Section 7 of the Clayton Act.

2. Whether, prior to the entry of a final order by an administrative agency which is currently proceeding under

Section 11(b) of the Clayton Act, a court of appeals has jurisdiction under 28 U.S.C. 1651(a) to issue interlocutory orders in order to make it less difficult for the agency to devise an effective remedy when neither the jurisdiction of the agency nor the potential jurisdiction of the court has been threatened.

3. Whether this Court should review the narrow jurisdictional question presented by the petition for certiorari when it is manifest that the exercise of equitable jurisdiction by the court below would constitute such a departure from the accepted and usual course of judicial proceedings as to constitute an abuse of discretion and require reversal by this Court.

STATEMENT

For years Bowman Dairy Company ("Bowman") was the largest dairy in the Chicago area. It also operated, through subsidiaries, in other markets in the midwest, but over half its business was conducted in the Chicago market. In that market Bowman has been suffering operating losses of approximately one million dollars per year, and its sales volume, historically based largely on retail home delivery routes, has been steadily declining.[1]

The modest profits derived from some of the other markets were not sufficient to offset the losses in Chicago. On a company-wide basis, Bowman was obtaining a plainly inadequate return on its invested capital. After long and careful deliberation, the directors and stockholders of Bowman decided to discontinue dairy operations. Alternative courses of action were considered and investigated through the past three years.[2]

---

[1] See Kullman Affidavit. The affidavits referred to herein are incorporated in the appendix filed by respondents in the court of appeals except the Adamson affidavit which Bowfund proposes to file with this brief.

[2] See affidavits of Kullman, Clark, Turner and Bowman.

On December 13, 1965, Bowman entered into an agreement to sell its operating assets to Dean Foods Company ("Dean") on January 3, 1966.[3] Those assets had a book value, as of June 30, 1965, of $19,096,851. The price which Dean agreed to pay for those assets (subject to adjustments based on transactions up to the closing date) was $12,538,384.[4] If it is assumed that Bowman's current assets had an actual value substantially equal to their book value,[5] the agreement provided for a sale by Bowman of fixed assets having a book value of $10,308,546, for a purchase price of $3,750,079.[6] Neither the agreement nor Bowman's books and records assigned any value to goodwill, going concern value, or other intangibles.

By a series of written amendments to the contract, the closing date was postponed until 2:00 o'clock P.M. on January 19, 1966. The proceedings in the court of appeals having terminated at approximately 11:15 A.M. on that day, Bowman tendered performance under the contract and the transaction was closed at 2:00 o'clock P.M. The operating assets formerly owned by Bowman are now owned by Dean, and all operations since the closing date have been conducted under Dean's supervision and direction and at Dean's risk. (See Adamson affidavit).

---

[3] Exhibit B to emergency petition.

[4] See Adamson Affidavit. Of this amount $5,597,301 was payable in cash, and $6,940,683 by the assumption, on the closing date, of Bowman's liabilities. These figures are based on the June 30 statement, and, as with respect to the asset values and aggregate price, are subject to adjustment based on an audit of Bowman's net worth as of the closing date.

[5] This is a reasonable assumption since inventories are to be valued at the lower of cost or market, prepaid items consist largely of insurance and other payments which are equally valuable to the purchaser, and the book value of the accounts receivable is computed after giving effect to the allowance for doubtful accounts deemed adequate by independent Certified Public Accountants.

[6] See Adamson Affidavit.

The assets which Dean has acquired are described in detail in the closing documents or in the books and records which were delivered at the closing (See Adamson affidavit). Parcels of real estate are described by legal description contained in recorded deeds, vehicles by title and license registrations, items of machinery and equipment may be identified by serial number and property ledger accounts, trade names and trademarks by registration numbers and other descriptions, and the names and addresses of Bowman's former customers are reflected in route books and other sales records. The assets which Dean has acquired can easily be identified if such identification should ever be necessary.

Immediately after the closing Bowman's corporate name was changed and the proceeds of sale were invested (Adamson affidavit).

Description Of The Litigation

Four separate proceedings have been commenced by the Federal Trade Commission:

1. On December 22, 1965, the Commission issued its complaint under Section 11(b) of the Clayton Act, 15 U.S.C. Section 21(b), alleging that the acquisition of Bowman's assets by Dean may substantially lessen competition in violation of Section 7 of the Clayton Act. The complaint contains no prayer for relief. That proceeding is presently pending before the Federal Trade Commission and presumably will go forward before the Commission and ultimately the court of appeals, in normal fashion.

2. On December 30, 1965, the Commission filed its Emergency Petition for a preliminary injunction and other relief in the court of appeals. The allegations of the Petition set forth the reasons why it will allegedly be "extremely difficult for the Commission to devise any effective remedy after its decision on the merits" unless an injunction is

issued by the court. In the opinion of the Commission, as explained in affidavits attached to the Emergency Petition, it is "difficult" for the Commission to order effective divestiture.[7] Moreover, as the Commission states in paragraph 10 of its Emergency Petition: "The Federal Trade Commission is without jurisdiction to prevent the destruction of Bowman as a viable independent entity." The Emergency Petition does not describe the nature of the order the Commission would enter at the conclusion of the Commission proceedings if a violation should be found.

The Emergency Petition prayed for the entry of (a) a temporary restraining order during the pendency of the matter in the court of appeals, (b) a preliminary injunction restraining the closing until after the conclusion of all proceedings before the Commission, and (c) such other and further relief as might be appropriate.

On January 4, 1966, the court of appeals entered the temporary restraining order requested by the Commission. Oral arguments, based on the Emergency Petition, affidavits submitted by the parties and the written briefs, were made on January 7, 1966.

On January 19, 1966, the court of appeals dismissed the Emergency Petition and dissolved the temporary restraining order. In a unanimous opinion, the court held that Congress had not authorized the Federal Trade Commission to apply to the Court of Appeals for the relief requested in the Emergency Petition. The Court pointed out

[7] "It has been my experience that effective divestiture relief in merger cases is always difficult." Page 2 of affidavit of Harry Bender attached to the Emergency Petition as Exhibit D. Mr. Bender states that it is "difficult" to locate satisfactory purchasers and that the working out of satisfactory divestiture arrangements has been "extremely difficult." His conclusions are based on references to certain conglomerate merger cases which are quite unlike the facts of the present case.

that Congress had considered and rejected legislative proposals to confer such authority upon the Commission.

3. On January 20, 1966, the day after the closing, the Commission presented its application for a preliminary injunction to Mr. Justice Clark. Pursuant to that application, Mr. Justice Clark entered an order restraining any material changes in the acquired assets. The order provides, however, that Dean may dispose of retail milk routes in Chicago on certain conditions. That order remains in effect pending the disposition of the certiorari petition.

4. On January 31, 1966, the Commission filed its petition for a writ of certiorari in this Court. The petition presents only the narrow question of jurisdiction of the court of appeals under the All Writs Act. This question was not reached by the court below, which merely held that the Commission did not have authority to institute the proceeding in that court. Moreover, the petition urges the Court *not* to consider whether, as a matter of discretion, jurisdiction under the All Writs Act should be exercised in a case of this character.

ARGUMENT

I.

THE QUESTION PRESENTED DOES NOT HAVE THE IMPORTANCE ASCRIBED TO IT BY THE COMMISSION.

The Commission contends that the ruling of the court below is important because, if upheld, it "would disable the Commission from effectively proceeding in a significant number of important merger cases." (Cert. Pet. 6)

For over 50 years the Commission has had authority to order divestiture as a remedy for a violation of Section 7 of the Clayton Act. Divestiture has been called the most important of antitrust remedies. "It is simple, relatively easy to administer and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." *United States* v. *DuPont & Co.*, 366 U.S. 318, 331. The ruling of the court below does not disable the Commission from entering a divestiture order if the facts warrant such relief, or indeed any relief in this case. Nor does it disable the Commission from continuing to proceed effectively with the enforcement of Section 7, and continuing to enter divestiture orders in appropriate cases, as it has for many years.[8] It merely prevents the Commission from

[8] The Commission suggests that the importance of the question is illustrated by difficulties which it encountered in obtaining adequate relief in *Ekco Products* v. *Federal Trade Commission*, 347 F.2d 745 (C.A. 7) (Cert. Pet. p. 8, note 5; also Cert. Pet. p. 10). The court of appeals opinion in that case, however, describes the relief which the Commission did obtain as "rather harsh" (p. 753), and the factual situation as "narrow and somewhat unique" (p. 751); "narrow" (p. 753); and again as "unique" (p. 753). The Blackman assets which had been "sold off" were simple dies worth about $40,000 which could easily have been replaced. If the *Ekco* case presents the strongest illustration the Commission can find to demonstrate its need for extraordinary judicial assistance, the Commission's problems are not very serious.

extending its authority beyond the bounds within which it has functioned in the past.

In the exceptional case in which equitable relief, other than a simple divestiture order, may be appropriate, Congress has provided a completely adequate remedy to be pursued by the Attorney General. The question whether such exceptional proceedings may only be instituted by the Attorney General, or in addition should also be available to a second representative of the public, is hardly an issue of overriding importance in the administration of justice. The issue involves considerations relating to allocations of work and the budgets of the respective branches of the Government. Such considerations are properly the concern of the executive and legislative departments; they are not the type of considerations which should motivate this Court to grant certiorari. Those considerations were no doubt reviewed carefully by Congress when it declined to grant the Federal Trade Commission the type of authority which it seeks to assert in this litigation.

The desire of the agency for a duplication of enforcement authority and responsibility does not present an important question of law which should now be settled by this Court. As a practical matter, the question has been settled for years by unequivocal manifestations of the intent of Congress.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT BELOW AND THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN BOARD OF GOVERNORS OF FEDERAL RESERVE SYSTEM v. TRANSAMERICA CORPORATION.

The extraordinary writ issued by the Court of Appeals for the Ninth Circuit against Transamerica in 1950

prevented a total ouster of the agency's jurisdiction to continue administrative hearings which had commenced approximately two years earlier. 184 F. 2d 311, *cert. den.*, 340 U.S. 883. The hearings were being held on a complaint brought by the Board of Governors of the Federal Reserve System in 1948 challenging the legality under Section 7 of the Clayton Act of certain stock acquisitions which had taken place some time previously. No attempt was made, either at the outset of the administrative proceedings or at any later date, to enjoin any threatened violation of law.

At the time of those proceedings, which preceded the amendment making Section 7 applicable to asset acquisitions, it was possible for the respondents to oust the enforcement agency's jurisdiction by disposing of the assets of the acquired corporation. See 184 F. 2d at p. 316 and cases cited. The writ which was issued by the court of appeals pursuant to 28 U.S.C. 1651(a) prevented the respondents from completely defeating the jurisdiction of the Board, as well as the potential jurisdiction of the court of appeals to review the final order of divestiture which was subsequently entered by the Board.

In his brief in opposition to the petition for certiorari filed by Transamerica in this Court, the then Solicitor General of the United States stated the principal question presented as follows:[9]

> "1. Whether, prior to the entry of a final order by an administrative agency which is currently proceeding under Section 11 of the Clayton Act, a court of appeals has jurisdiction under 28 U.S.C. 1651 *to prevent ouster of its ultimate and exclusive jurisdiction to enforce and review final orders of administra-*

[9] The certiorari petition in *Transamerica* also presented questions which arose out of the parties' contemptuous defiance of the court's order. See Petition for Certiorari at p. 4.

tive agencies under the Clayton Act." (Emphasis added.) *Transamerica Corporation, et al., Petitioners,* v. *Board of Governors of the Federal Reserve System,* Nos. 322, 323, O.T., 1950, Brief for Respondents at p. 2.

The questions presented here are entirely different. There is no doubt that the Commission's jurisdiction to proceed with its hearings will survive these court proceedings, that if it finds a violation of law it will have power to enter an order requiring divestiture of the assets acquired by Dean from Bowman, and that the court of appeals and this Court will thereafter have jurisdiction to review such an order. No question is involved of preserving the jurisdiction of the agency or of the courts. On the contrary, the Commission's entire position is predicated on an allegation that it needs the assistance of the court of appeals in devising an effective remedy.

The opinion of the Court of Appeals for the Ninth Circuit in the *Transamerica* case did not even consider the question decided by the court below. The court below held that the Federal Trade Commission did not have authority to apply to the courts of appeals for a remedy not contemplated by Section 11 of the Clayton Act. It, therefore, did not have occasion to consider the scope of its own powers under Section 1651(a). On the other hand, the opinion in *Transamerica* did not consider the authority of the Federal Reserve Board to initiate judicial proceedings other than those described in Section 11 of the Clayton Act.[10]

The fact that the Court of Appeals for the Second Circuit in *Federal Trade Commission* v. *International Paper Co.,*

[10] *Transamerica* contended that the Board's authority under Section 11 was limited to enforcement of Section 8 of the Clayton Act and did not include enforcement of Section 7. This, of course, is a different contention from the point made here, namely, that since Section 11 prescribes the procedure to be followed by the agency, that procedure is exclusive.

241 F. 2d 372, stated its disagreement with the conclusion of the Ninth Circuit in *Transamerica*, certainly does not create a conflict between the ruling below and *Transamerica*.

The *International Paper* case is of interest for different reasons. It points out that the Court of Appeals for the Second and Third Circuits have reached the same conclusion as the court below. Moreover, it demonstrates that the emergency allegations of the Commission must be interpreted in the light of the fact that the Commission is appearing as a litigant rather than an administrative agency which has entered an appropriate order after the conclusion of hearings before an impartial examiner. For there, as here, the Commission alleged that immediate relief was urgently required because if the transaction were permitted to close, it would become "impossible"[11] to order divestiture later on. As a matter of history, after the Second Circuit rejected the Commission's plea of emergency, the matter went forward before the agency according to established procedures and ultimately ended with the entry of divestiture orders. See 53 FTC 1192 (1957); 56 FTC 1671 (1960).

III.

THE COURT OF APPEALS CORRECTLY HELD THAT CONGRESS HAS NOT AUTHORIZED THE FEDERAL TRADE COMMISSION TO PETITION THAT COURT FOR INTERLOCUTORY RELIEF IN ORDER TO MAKE IT LESS DIFFICULT FOR THE COMMISSION TO DEVISE AN EFFECTIVE REMEDY AGAINST AN ALLEGED VIOLATION OF SECTION 7 OF THE CLAYTON ACT.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies

[11] Actually, in this case the Commission uses the term "extremely difficult" rather than the term "impossible" which it used in *International Paper*.

embodied in statutes in accordance with the legislative standards therein prescribed, and to perform other specified duties as a legislative or judicial aid. *Rathbun* v. *United States*, 295 U.S. 602, 628. The legislative standards limit the powers of the President in dealing with the Commission and necessarily also limit the powers of the Commission itself. The authority of the Commission to initiate judicial proceedings, whether ordinary or extraordinary in character, must be found in the statutes creating the agency and defining its powers. *Federal Trade Commission* v. *Eastman Kodak*, 274 U.S. 619, 623; *Cf. Peters* v. *Hobby*, 349 U.S. 331, 345.

The All Writs Act, 28 U.S.C. 1651(a), contains no grant of authority to the Federal Trade Commission or to any other administrative agency. That statute in terms grants authority only to this Court "and all courts established by Act of Congress." The Commission is not a "court."

The proceedings which the Commission is authorized to initiate are described in detail in various statutory provisions, none of which includes an original application to a court of appeals for equitable relief against an alleged threatened violation of Section 7 of the Clayton Act.[12]

The relief which the Commission is authorized to obtain if a violation of Section 7 of the Clayton Act is found to have occurred is set forth in Section 11(b) of that Act. That section authorizes the Commission to order divestiture of the acquired stock or assets. It does not authorize the Commission to seek or obtain general equitable relief. When Congress intended to grant such authority in Section 7 litigation, it did so clearly and unequivocally; but

[12] With reference to equitable relief, the Commission has been granted specific authority under Section 13 of the Federal Trade Commission Act (15 U.S.C. 53) to enjoin false advertising; in addition, the Commission may seek injunctive relief from the district courts to prevent violation of the Textile Fiber Products Identification Act, the Fur Products Labeling Act, the Wool Products Labeling Act, and the Flammable Fabrics Act. See 15 U.S.C. 68(e), 69(g), 70(f) and 1195.

the grant was to the Attorney General, not to the Commission.[13]

The relief which the Federal Trade Commission is authorized to seek in a court of appeals is also described in the statutes. With certain exceptions specifically defined,[14] the only relief which the Commission may obtain in that court is enforcement of an order which the Commission itself has the power to enter. *Federal Trade Commission* v. *Eastman Kodak, supra* at 623-4. The Commission may order divestiture and may petition the court of appeals for enforcement of the divestiture order.

The Commission, however, is not authorized to enter interlocutory orders granting equitable relief.[15] It has no power to order the Bowman assets to be preserved as a "viable independent entity." This lack of power is expressly acknowledged by the Commission at page 7 of its Emergency Petition. It is submitted that the Commission does not have the power to petition a court of appeals for the entry or enforcement of a remedial order which is broader than the Commission itself has power to enter.

The allegations of the Petition relating to the difficulties which the Commission may encounter in devising an effective remedy if a violation is ultimately found cannot add

---

[13] Section 15 of the Clayton Act (15 U.S.C. 25) authorizes the Attorney General "to institute proceedings in equity, to prevent and restrain such violations" and empowers the district courts to enter such orders "as shall be deemed just in the premises."

[14] Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. 45(c) and Section 11(c) of the Clayton Act, 15 U.S.C. 21(c) authorize the Commission to petition a court of appeals to "issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite." However, under both statutes, such writs can only be issued *after* the record has been filed for review of a cease and desist order.

[15] In the petition for certiorari, at pp. 7-8, the Solicitor General acknowledges that ". . . the Commission has no power to issue a preliminary injunction or stay *pendente lite*."

to the powers delegated to the Commission by Congress.[16] The Commission's premature assertion of a right to judicial relief "is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 50-51.

The doctrine requiring the exhaustion of administrative remedies is not normally invoked against the agency itself. But the orderly and economic administration of justice which underlies the doctrine is as important to the private litigant as to the agency. An agency should not be permitted to circumvent its own regular procedures by asserting that an anticipated defense is groundless, or that the remedy authorized by Congress may be inadequate.[17] The agency should be required, as private litigants are, to follow the procedures authorized by the relevant statutes and its own regulations.[18]

---

[16] The remedy chosen by Congress is binding upon both the agency and the court, even if the agency feels that Congress has chosen the wrong way to accomplish its aim. *N.L.R.B.* v. *Radio & Telev. Broadcast Eng. Union*, 364 U.S. 573, 583.

[17] See *Myers* v. *Bethlehem Shipbuilding Corporation, supra*, and cases cited, at p. 51.

[18] In this regard, the provisions of the Administrative Procedure Act, 5 U.S.C. 1001, et seq., are relevant. Section 1002 of that Act requires every administrative agency to "separately state and currently publish in the Federal Register . . . the nature and requirements of all formal or informal procedures available. . . . No person shall in any manner be required to resort to . . . procedures not so published." *Cf., United States* v. *Morton Salt Co.*, 338 U.S. 632, 643. The Federal Trade Commission has published the rules of procedure available to it, and they do not include the relief requested here. See 16 C.F.R. Chapter 1, Subchapter A, 28 F.R. 7080, as amended 30 F.R. 8216. Those rules specifically set forth the sole instances in which the Commission may request the Court to issue "such writs as are ancillary to its jurisdiction." In terms, such relief may be obtained only when the Court of Appeals has obtained jurisdiction to review a cease and desist order. See Federal Trade Commission, Organization, Procedure and Rules of Practice, August, 1963, Subpart K, Section 1.112.

The Commission's request for additional remedial powers should be addressed to Congress, not to the judiciary.

IV.

THE ANSWER TO THE QUESTION PRESENTED BY THE PETITION FOR CERTIORARI IS PLAINLY INDICATED BY THE DECISIONS OF THIS COURT CONSTRUING THE ALL WRITS ACT.

The court of appeals did not reach the question whether, assuming that the Commission had authority to initiate the proceeding, the court itself had jurisdiction pursuant to Section 1651(a) to grant the equitable relief sought. That question, although not decided below, is the only question presented by the certiorari petition. We believe the question has already been answered by decisions of this Court.

Since a writ issued under Section 1651(a) is an extraordinary remedy reserved for truly exceptional cases, the availability of an adequate alternative remedy, which has not been exhausted by the applicant, bars the use of the writ. *Ex parte Fahey*, 332 U.S. 258, 259-260. It has been repeatedly held that "whatever may be done without the writ may not be done with it." *Bankers Life & Casualty Company* v. *Holland*, 346 U.S. 379, 383; *Ex parte Rowland*, 104 U.S. 604, 617.

Congress has provided the Commission with an adequate remedy against a threatened violation of Section 7. The Commission is directed by Section 11(b) of the Clayton Act to provide the Attorney General with a copy of every complaint which it issues alleging a violation of Section 7, and the Attorney General has a statutory duty to institute proceedings in equity to prevent and restrain violations of

Section 7 whenever the facts warrant such relief.[19] It must, of course, be presumed that the Attorney General will perform his statutory duty. The "informal arrangments" between the Commission and the Attorney General have not ousted the latter of his statutory power to enforce the Clayton Act against Chicago dairies. See *United States* v. *The Borden Company*, 370 U.S. 460. Certainly such informal arrangements do not excuse the Commission from its obligation to exhaust its alternative remedy before applying for the issuance of an extraordinary writ.

Moreover, the relief sought by the Emergency Petition filed in the court of appeals is fundamentally different from the office which an extraordinary writ was intended to perform. The function of the writ is to confine an inferior tribunal to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245. The issuance of the writ must be "agreeable to the usages and principles of law." See *United States* v. *Hayman*, 342 U.S. 205, 221, note 35. This Court has never sanctioned the use of the writ as a device to expand the jurisdiction of either court or agency as prescribed by statute.

In this case, the basis for the Emergency Petition filed in the court of appeals is an acknowledgement that the Commission itself does not have the power to order the relief which is requested from the Court. Thus, instead of seeking to protect jurisdiction which is otherwise conferred, the Commission seeks to expand the remedial powers of

[19] See 15 U.S.C. Sections 21(b) and 25; 28 U.S.C. Section 507. Since the Assistant Attorney General in charge of the Antitrust Division appears in this Court as counsel for the Commission, it is apparent that the existing spirit of cooperation between the Commission and the Department of Justice will lead to effective prosecution of all Section 7 cases in which preliminary relief is required without resort to the issuance of any extraordinary writs.

both court and agency.[20] The writ is not sought in aid of the Court's jurisdiction within the meaning of Section 1651(a).

V.

IT WOULD BE A MANIFEST ABUSE OF DISCRETION FOR THE COURT OF APPEALS TO ISSUE AN EXTRAORDINARY WRIT IN THIS CASE EVEN IF IT HAS POWER TO DO SO.

The issuance of a writ pursuant to 28 U.S.C. Section 1651(a) is not a matter of right, but of sound discretion to be exercised sparingly.[21] There are compelling reasons why the courts of appeals should not be invited to exercise that discretion in cases of this kind, or in this particular case.

It is not appropriate for the courts of appeals to hear and determine original applications for such writs, in cases of this character. The parties are obviously entitled to a full and fair hearing on any such application. The problems involved in conducting such a hearing are illustrated by the procedures which have been developed for use in the district courts.

An Emergency Petition seeking preliminary injunctive relief is entitled to priority treatment. A temporary re-

[20] If the Commission had obtained an injunction enjoining the sale, there never would have been any occasion for the Commission to order Dean to divest itself of any assets acquired from Bowman. For either the Commission would have found the proposed acquisition lawful (in which event no relief would be appropriate), or else it would have found the proposed transaction unlawful (in which event it presumably would have entered some kind of order designed to make the Court's preliminary injunction permanent). In that event, no assets would ever have been acquired, and there would be nothing to order divested. Thus, the Emergency Petition in reality did not seek a writ in aid of a proposed divestiture order but an entirely new remedy never prescribed by Congress.

[21] See this Court's Rule 30 and cases cited therein.

straining order may be entered on the basis of affidavits, but such an order must be limited in duration.[22] Before it is replaced by a preliminary injunction, the parties are entitled to offer evidence, to subpoena witnesses to testify in their behalf, to cross-examine the witnesses offered by their adversaries, to make objections to the admissibility of evidence submitted to the court, and to present arguments with respect to the form and substance of the injunctive decree, if any. Thereafter, the court is required under Rule 52(a) to enter findings of fact and conclusions of law. After entry of an order,[23] the court retains jurisdiction to consider requests for modification in the light of changed conditions, or to punish violations of the order. For all of these functions the district court is well suited, and its procedures are specified by rule and have been well developed in practice. All of these functions and procedures, however, are inappropriate for courts of appeals.

The procedures and rules in the courts of appeals relate to appellate matters and do not contemplate the kind of work which the Federal Trade Commission is inviting them to undertake.[24] These considerations alone serve as an adequate basis for denying the petition for certiorari.

Moreover, the lack of merit in the Commission's underlying position provides a compelling reason why the Court of Appeals should not have exercised whatever discretion

---

[22] See Rule 65 of the Rules of Civil Procedure for the United States District Courts.

[23] Orders granting or denying a preliminary injunction are appealable. See 28 U.S.C. 1292(a)(1).

[24] Although the invitation is extended in a Section 7 case, if the court's legal theory were sound, any matter over which the Commission has jurisdiction might provide the basis for an application to a court of appeals for a writ under Section 1651(a).

it might have had in this case.[25] The relief requested by the Commission here would cause irreparable harm to private parties without any corresponding benefit to the public.

Prior to the acquisition, Bowman was the biggest dairy in Chicago. The Chicago operations were, however, losing money at an alarming rate. Dean proposes to take steps which will (1) materially reduce the size of the Bowman business, and (2) reduce or eliminate the operating losses in Chicago. The Commission, however, wants the court of appeals to enter an order preserving both the size and the unprofitability of the Bowman business. It is urged that this anomalous request is in the public interest because Bowman must, at all costs, be maintained as a "viable independent entity".

The rubric is based on a series of incorrect assumptions. The Commission incorrectly assumes that the remedy of divestiture requires reconstitution of the acquired business, rather than the so-called "dismemberment," or voluntary disposition of various assets which is planned by Dean. Implicit in this assumption is a further assumption that antitrust considerations make it more desirable to restore about 40% of the market to the four largest firms than to permit dismemberment of Bowman and divestiture of the fragments to a variety of purchasers. Such dismember-

[25] We shall not argue the merits of the Commission's complaint. We cannot resist pointing out, however, that the Commission has assumed the impossible burden of proving that the acquisition may adversely affect competition in the Chicago market where Bowman's operations were obviously destined to terminate even if the sale to Dean had not taken place. The facts that Bowman has other operations in other markets and has accumulated cash and securities which it is unwilling to dissipate to subsidize continuing losses in the relevant market have no bearing on the issue of violation. The so-called "failing company doctrine" is merely a recognition of the fact that Section 7 is not violated unless an injury to competition will probably result from the acquisition and that no injury does result when it is obvious that the acquired company would have withdrawn from the relevant market even if the acquisition had not occurred.

ment and piecemeal divestiture would obviously result in a less concentrated market than would the reconstitution of Bowman. For after dismemberment the three leading firms would account for only about 24% of the business. The suggested reconstitution of Bowman is neither necessary nor appropriate to any legitimate antitrust objective.

The Commission also incorrectly assumes that the Bowman business represents a "viable independent entity" which may be divested more easily in its present form than in some different form which may result from Dean's management.[26] If this be true, there must be intangible value to the Bowman business as a going concern; it must have substantial earning capacity in its present form. But the contrary is established by the undisputed facts of record. Bowman's assets were sold for a fraction of their book value. Nothing was paid by Dean for goodwill or other intangibles. The business is losing money. The Commission has cited no precedent for requiring a losing business to continue to suffer losses.

Finally, it should be noted that the Commission's theory with respect to the alleged illegality of the acquisition is inconsistent with its request that the Bowman business be kept intact. Focusing on Chicago, the Commission alleges that a market share of 23% (Dean's 7% plus Bowman's 16%) is unlawful, *and* that Dean should not be permitted to divest itself of approximately one-half of the business acquired from Bowman and thus reduce its size to about 15%. In other words, the Bowman 16% market share must be preserved, but Dean may not have a 15% share. The Commission's position in this litigation is not only novel and extraordinary; it is unsound.

[26] Even if this were true, an extraordinary writ should not be issued just to make it easier for the Commission to order one form of divestiture rather than another.

VI.

THE QUESTION PRESENTED BY THE PETITION FOR CERTIORARI IS TOO VAGUE AND HYPOTHETICAL TO BE DECIDED BY THIS COURT ON THE RECORD BEFORE IT.

The Emergency Petition asked the court of appeals to enter an injunction preventing Bowman from selling its operating assets to Dean until after the conclusion of the hearings before the Federal Trade Commission. However, the event which the Emergency Petition sought to enjoin has now taken place.

The Commission states in its Petition for Certiorari that the question presented to this Court is whether the court of appeals has power "to issue a preliminary injunction preserving the status quo pending completion of the proceedings before the Commission." (Cert. Pet. p. 21)[27]

There is no record before this Court which adequately defines the nature of the particular transactions which the Commission would like to restrain prior to the conclusion of its own proceedings, the specific factual basis establishing the need for any such specific restraints, or the form of order which the Commission seeks to have entered and enforced for the duration of its hearings.

The acquired assets include a large number of operating plants and a variety of other physical assets. Management decisions must be made from day to day on the use and operation of those assets. Inevitably some will be replaced, others will be modified, and still others will be abandoned

[27] The question which the Commission stated that it proposed to present at the time of its application to Mr. Justice Clark for a preliminary injunction was phrased more nearly like the question which had been presented to the court of appeals. In preparing the petition for certiorari, however, the Commission apparently realized that the reference to "consummation of a merger" is inapposite to an assets purchase which has been consummated.

or sold, all in the ordinary course of business. A general command to a going business "to maintain the status quo" for a period of several years is too vague to be meaningful.[28]

The Emergency Petition does not adequately identify any specific relief which the Commission now seeks or the need for any such specific relief. The petition for certiorari, therefore, presents a question which is too hypothetical for review by this Court at this particular time.

CONCLUSION

In due course, if the procedures specified by Congress are followed in this case, the Commission will be able to consider all relevant evidence and determine whether or not any remedy at all is appropriate in this case.

It is respectfully submitted that the litigation in the court of appeals, and in this Court should not be prolonged, and that the petition for writ of certiorari should be promptly denied.

Respectfully submitted,

L. Edward Hart
John Paul Stevens
Edward I. Rothschild
Attorneys for Respondent,
Bowfund Corporation, formerly
Bowman Dairy Company

Of Counsel

Rothschild, Hart, Stevens & Barry
105 South La Salle Street
Chicago, Illinois 60603

[28] In *United States* v. *DuPont & Co.*, 366 U.S. 316, this Court also noted that the "policing of an injunction would probably involve the courts and the Government in regulation of private affairs more deeply than the administration of a simple order of divestiture." 366 U.S. 316, at p. 334. Such continued regulation of private affairs is necessarily involved in the relief which the Commission would seek upon remand.